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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10 GUSTAVO LOPEZ, ) Case No. CV 06-8165-PJW  
11 Plaintiff, )  
12 v. ) MEMORANDUM OPINION AND ORDER  
13 MICHAEL J. ASTRUE, )  
14 COMMISSIONER OF THE )  
15 SOCIAL SECURITY ADMINISTRATION, )  
16 Defendant. )

17 Before the Court is Plaintiff's appeal of a decision by Defendant  
18 Social Security Administration ("the Agency"), denying his application  
19 for Supplemental Security Income ("SSI") benefits for the closed  
20 period between October 9, 1997 and February 12, 2001. Because the  
21 Agency's decision that Plaintiff was not disabled is not supported by  
22 substantial evidence, the decision is reversed and the case is  
23 remanded for further proceedings.

24 Plaintiff applied for SSI benefits on October 9, 1997. (AR 160-  
25 62.) The application was denied initially and on reconsideration.  
26 (AR 72-75, 78-81.) He then requested and was granted a hearing.  
27 After a hearing on October 30, 1998, an Administrative Law Judge  
28 ("ALJ") issued a decision dated January 26, 1999, finding that

1 Plaintiff could perform the full range of light work and, therefore,  
2 he was not disabled. (AR 42-50.) Plaintiff appealed and, on March 5,  
3 2001, the Appeals Council remanded, directing the ALJ to consider  
4 whether Plaintiff was restricted in the use of his left shoulder and  
5 whether he had a mental impairment. (AR 101-04.)

6 After a new hearing on February 19, 2002, a different ALJ issued  
7 a decision on July 2, 2002, in which he found that Plaintiff could  
8 perform light work with some additional exertional and non-exertional  
9 limitations and that, pursuant to the testimony of a vocational  
10 expert, a significant number of jobs existed in the economy that he  
11 could perform. (AR 54-66.) Plaintiff appealed and the Appeals  
12 Council reversed again, finding that Plaintiff became disabled as of  
13 February 13, 2001. The Council directed the ALJ to determine whether  
14 benefits were payable after that date. (AR 122.) In addition, it  
15 instructed the ALJ to reevaluate the opinions of Plaintiff's treating  
16 physician (Dr. Serna) and examining psychiatrist (Dr. Edelman) and  
17 reconsider Plaintiff's credibility. (AR 122.) The ALJ was also  
18 instructed to obtain testimony from a vocational expert to determine  
19 whether Plaintiff was disabled from October 9, 1997 to February 12,  
20 2001. (AR 123.)

21 After two further hearings on August 17, 2004 and January 4,  
22 2005, a third ALJ issued a decision on April 26, 2005, in which she  
23 found that Plaintiff was capable of performing medium work with some  
24 postural and mental limitations and, therefore, was not disabled  
25 between October 9, 1997 and February 12, 2001. (AR 20-32.) Plaintiff  
26 appealed the ALJ's decision, which appeal was denied. (AR 9-11.)  
27 Plaintiff then commenced this action.

1 Plaintiff first contends that the ALJ erred when she failed to  
2 articulate specific and legitimate reasons for rejecting the opinion  
3 of his treating physician, Dr. Rafael Serna. (Joint Stipulation at 4-  
4 6.) Plaintiff argues that the ALJ rejected Dr. Serna's opinion after  
5 summarily concluding that it was not supported by objective findings,  
6 without explaining why. (Joint Stipulation at 5.) This claim is  
7 without merit.

8 "By rule, the Social Security Administration favors the opinion  
9 of a treating physician over non-treating physicians." *Orn v. Astrue*,  
10 495 F.3d 625, 631 (9th Cir. 2007); see also *Aukland v. Massanari*, 257  
11 F.3d 1033, 1037 (9th Cir. 2001). Where the treating physician's  
12 opinion is contradicted by other medical evidence in the record, it is  
13 entitled to deference unless there are specific and legitimate  
14 reasons, supported by substantial evidence in the record, for  
15 rejecting it. *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir.  
16 2001).

17 In a "Medical Evaluation Form" completed on January 7, 1997, Dr.  
18 Serna stated that Plaintiff had experienced low back pain, bilateral  
19 shoulder pain, and neck pain ever since he was injured in a motor  
20 vehicle accident in February 1995. (AR 225.) Dr. Serna opined that  
21 Plaintiff's condition would completely preclude him from climbing,  
22 balancing, stooping, kneeling, crouching, and crawling; limit his use  
23 of his upper extremities for pushing, pulling, lifting, or reaching;  
24 and render him unable to sit, stand, or ambulate for two hours or more  
25 in an eight-hour workday. (AR 225-27.) Dr. Serna also opined that  
26 Plaintiff could lift no more than ten pounds occasionally (and perform  
27 no frequent lifting at all) because of his back strain and shoulder  
28 pain. (AR 226.)

1 In her decision, the ALJ noted that Dr. Serna's opinion was  
2 contradicted by other medical evidence in the record. She relied on  
3 the testimony of Dr. Michael Gurvey, an orthopedic specialist who  
4 testified as a medical expert at the January 2005 hearing, to find  
5 that Plaintiff would not have the functional limitations assessed by  
6 Dr. Serna.<sup>1</sup> (AR 26-27.) At the January 2005 hearing, Dr. Gurvey  
7 testified that an X-ray dated March 5, 1997 "showed some decreased  
8 [sic] at the inner vertebral space between L2 and L3. Subsequent x-  
9 rays of the low back were insignificant. They showed some minor  
10 degenerative changes ...." (AR 556, referring to AR 328, 410, 429.)  
11 He further testified that an MRI dated November 13, 1995 showed a two-  
12 millimeter protrusion, which, to him, was an insignificant finding.  
13 (AR 556-57, referring to AR 220-21.) Dr. Gurvey concluded that  
14 Plaintiff's lower back showed only "minimal arthritic changes which  
15 are probably consistent for his age and nothing else." (AR 557.)

16 As for Plaintiff's neck, Dr. Gurvey testified that "physical  
17 examination[s] are almost all normal," with an MRI in November 1995  
18 showing "some mild degenerative changes." (AR 558, referring to AR  
19 219.) With respect to Plaintiff's left shoulder, Dr. Gurvey testified  
20 that one x-ray taken on January 16, 1998, was normal, while a second,  
21 dated July 19, 2002, "show[ed] some arthritic changes at the AC  
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23 <sup>1</sup> Plaintiff's argument implies that the only reason given by the  
24 ALJ to reject Dr. Serna's assessment is that there were no objective  
25 findings to support it. (See Joint Stipulation at 5.) As noted  
26 above, however, the ALJ relied primarily on Dr. Gurvey's testimony,  
27 which was based on independent clinical findings that differed from  
28 those of Dr. Serna. See *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th  
Cir. 1995)(holding that ALJ could properly disregard treating  
physician's opinion that was contradicted by other medical opinions in  
favor of nontreating source opinion based on independent clinical  
findings).

1 joint." (AR 558, referring to AR 263, 410.) Additionally, Dr. Gurvey  
2 cited the findings of neurologist Dr. Kristof Siciarz, who examined  
3 Plaintiff on October 11, 2001, and found no back tenderness or spasm,  
4 (AR 366), which would be expected in a patient with a sprained or  
5 strained ligament. (AR 564.) Dr. Gurvey also cited the findings of  
6 Dr. Edward Mosley, who evaluated Plaintiff on November 11, 1997 and  
7 found no back tenderness or muscle spasms, normal range of motion in  
8 the neck, shoulders, and extremities, and a normal gait.<sup>2</sup> (AR 565,  
9 referring to AR 233-37.) Whereas Dr. Serna appeared to base his  
10 functional assessment on a 1995 MRI that showed mild arthritis, a 1996  
11 orthopedic evaluation revealing "suspect[ed]" acromio-clavicular  
12 arthritis, (AR 223), and the results of a physical examination that  
13 revealed shoulder tenderness, (AR 225), Dr. Gurvey flatly disagreed  
14 with these findings and conclusions. He based his opinion on other  
15 objective findings in the medical record, including the independent  
16 clinical findings of Drs. Siciarz and Mosley, neither of whom found  
17 tenderness or other abnormalities.

18 Dr. Gurvey concluded that the functional capacity restrictions  
19 found by Dr. Serna were not consistent with the medical record and  
20 that Plaintiff should be restricted, only as a prophylactic measure,  
21 to occasionally lifting 50 pounds and frequently lifting 25 pounds,  
22 sitting, standing, or walking six hours in an eight-hour workday, and  
23 only occasionally crawling and climbing ladders and scaffolds. (AR  
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25 <sup>2</sup> Notably, Dr. Mosley stated that there were "no objective  
26 findings on which to base restriction of" Plaintiff's physical  
27 activities. (AR 237.) Dr. Siciarz stated that, because Plaintiff was  
28 not fully cooperative during the examination, "I cannot assess his  
functional capacity. Based on objective findings there are no  
limitations." (AR 367-68.)

1 557, 560-61.) The ALJ adopted Dr. Gurvey's functional assessment,  
2 noting that it was supported by Dr. Mosley's findings and by those of  
3 the state agency reviewers. (AR 27-28.)

4 Based on this review, the Court concludes that the ALJ's  
5 rejection of Dr. Serna's functional assessment was supported by  
6 substantial evidence in the record. Dr. Serna's opinion was plainly  
7 contradicted by the findings of other physicians, including Dr. Gurvey  
8 who opined, based on the medical record, that Plaintiff would not be  
9 as functionally limited as Dr. Serna found. "Opinions of a  
10 nonexamining, testifying medical advisor may serve as substantial  
11 evidence when they are supported by other evidence in the record and  
12 are consistent with it." *Morgan v. Comm'r of Soc. Security Admin.*,  
13 169 F.3d 595, 600-01 (9th Cir. 1999) ("The ALJ can meet this burden by  
14 setting out a detailed and thorough summary of the facts and  
15 conflicting clinical evidence, stating his interpretation thereof, and  
16 making findings")(quoting *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th  
17 Cir. 1989)). Because it was "solely the province of the ALJ to  
18 resolve the conflict" in medical opinions, see *Andrews*, 53 F.3d at  
19 1041, this claim does not warrant remand.

20 In his second claim of error, Plaintiff argues that the ALJ  
21 failed to properly evaluate the opinion of examining psychiatrist Dr.  
22 Barry Edelman. (Joint Stipulation at 9-10.) For the reasons set  
23 forth below, the Court agrees.

24 The ALJ must provide "clear and convincing reasons for rejecting  
25 the uncontradicted opinion of an examining physician." *Lester v.*  
26 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). This Court may only affirm  
27 an ALJ's decision for the reasons articulated by her in her decision.  
28 See, e.g., *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003).

1 On October 8, 2001, Dr. Edelman diagnosed Plaintiff with a  
2 depressive disorder, not otherwise specified, and opined that  
3 Plaintiff would be able to understand, remember and follow simple  
4 instructions, but would have difficulty with complex instructions;  
5 would be able to maintain concentration for simple work and an  
6 adequate pace in performing that work; and would be able to interact  
7 sufficiently with peers and supervisors, but would have moderate  
8 difficulty interacting with the public. (AR 360.) In a check-the-box  
9 form attached to his written evaluation, Dr. Edelman also indicated  
10 that Plaintiff would be moderately restricted in responding  
11 appropriately to changes in a routine work setting. (AR 363.)

12 In her decision, the ALJ found that Plaintiff would be limited to  
13 "simple, repetitive work not requiring public contact" and that  
14 "[t]here is no basis for a more limited mental functional capacity."  
15 (AR 29.) Plaintiff contends that the ALJ's failure to address Dr.  
16 Edelman's assessment that he suffers from moderate limitations in his  
17 ability to respond appropriately to changes in a routine work setting  
18 requires that the Agency's decision be reversed. For the following  
19 reasons, the Court agrees.

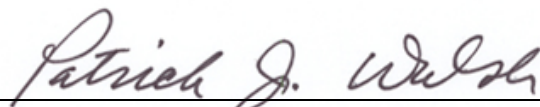
20 As Plaintiff urges and the Agency concedes, the ALJ overlooked  
21 Dr. Edelman's restriction on Plaintiff's ability to respond to changes  
22 at work. Though the Agency sets forth reasonable and rational reasons  
23 why this part of Dr. Edelman's opinion should be rejected, none of  
24 these reasons was championed by the ALJ and only her reasons, or, in  
25 this case, lack of reasons, control. See *Connett*, 340 F.3d at 874.  
26 Because the ALJ provided no reasons for rejecting this limitation, the  
27 case must be remanded so that she can address it.

1 Plaintiff asks the Court to go a step further and order payment  
2 of benefits. The Court recognizes it has the discretion to remand for  
3 the payment of benefits but concludes that this case is not  
4 appropriate for such relief. Though this case has a lengthy and  
5 circuitous history, it is not the result of lack of trying on the  
6 Agency's part. Further, the Court is not convinced that Plaintiff has  
7 established that he is clearly entitled to benefits. There are still  
8 issues that must be addressed before the ultimate issue of disability  
9 can be resolved. For this reason, Plaintiff's request that the case  
10 be reversed and remanded with instructions that the Agency award  
11 benefits is denied.

12 For the reasons set forth above, the ALJ's decision is reversed  
13 and the case is remanded for further proceedings consistent with this  
14 opinion.

15 IT IS SO ORDERED.

16 DATED: April 29, 2008.

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19 PATRICK J. WALSH  
20 UNITED STATES MAGISTRATE JUDGE  
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